Commonwealth of Pennsylvania

Court of Common Pleas
Fifth Judicial District
Allegheny County
330 Frick Building • 437 Grant Street
Pittsburgh, Pennsylvania 15219-6000

JEFFREY A. MANNING
President Judge

Judge's Chambers
412-350-7387

December 2, 2015

Mark D. Schwartz, Esquire
P.O. Box 330
Bryn Mawr, PA 19010-0330

Re: Robert Wideman

Dear Mr. Schwartz:

Attached is a copy of my letter to the Pennsylvania Board of Pardons regarding Robert Wideman.

I do not know whether he has counsel before the Board, but I thought you might be interested in the contents of my letter.

Very truly yours,

JEFFREY A. MANNING
President Judge

JAM:sk

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May 11, 2015

Ms. Tracy Forray
Secretary, Board of Pardons
Pennsylvania Board of Pardons
333 Market Street
15th Floor
Harrisburg, PA 17126-0333

Re: Robert Wideman – AP3468

Honorable Members of the Pennsylvania Board of Pardons:

I write to recommend the commutation of a life sentence for inmate Robert Wideman.

Forty (40) years ago Wideman and two other young men conspired to commit a robbery at Nicola "Nicky" Morena's Auto Sales on Route 51 in Pittsburgh.

I am intimately familiar with this case because it was assigned to me to investigate and ultimately prosecute the cases against the three defendants as a twenty-nine year old assistant district attorney for Allegheny County.

These are the facts as I presented them in three separate jury trials in 1976:

Robert Wideman, Michael Dukes and Cecil Rice put together a scheme claiming they wished to sell 10 "stolen" 25" color televisions for $800.00 ($80.00 each, worth $800.00 a piece) to entice a buyer or buyers, and insure they not only would have the money, but the victims would not report the robbery, themselves being involved in felony theft. As it turned out, there never were any televisions.

There is no doubt Robert Wideman was the mastermind in the scheme. He recruited his co-conspirators; he negotiated the "deal" with Nicky Morena; he had Rice rent the truck; and he "did all the talking."

On that fateful evening he arrived at Morena's Auto Sales in the truck with Dukes driving and Rice hidden in the back of the truck.

Morena was there with his cousins, the Slaby brothers and the $800.00.

Wideman got out of the truck as it backed up to the business garage. Morena flashed the money and the truck door was raised. There was Rice with a firearm. Morena threw the money and ran. Wideman shouted "stop him!" Dukes fired one shot from a 44. caliber magnum striking Morena in the back and sending him out into Route 51.

The perpetrators fled in the truck. Morena was taken by ambulance to a south side hospital and then to Mercy Hospital where he died.

Rice was the first to be apprehended and tried. **He did not cause the death of Nicky Morena.** He had no criminal record and received the "mercy dispensing power of the fact finder" when the jury convicted him of Third Degree Murder and Robbery. He was sentenced to 10 to 20 years imprisonment for Robbery and a consecutive 10 to 20 years for Third Degree Murder, 20 to 40 years. He was paroled in the early 1990's.

Wideman and Dukes fled, and were apprehended together in Boulder, Colorado several months later.

I prosecuted Robert Wideman in 1976. The jury convicted him of Second Degree, Felony Murder and he received the mandatory sentence of life imprisonment without the possibility of parole. **He did not do the act which caused the death of Nicky Morena, another human being.**

Dukes went to trial last and was convicted of Second Degree (Felony) Murder, and received a sentence of life without parole. **He killed another human being** in the course of a felony (robbery) dangerous to human life. He deserved and received a life sentence without parole.

Since prosecuting those cases in 1976, I went on to serve 12 years as an Assistant United States Attorney and First Assistant United States Attorney. In 1988, I was appointed to the Court of Common Pleas by Governor Robert P. Casey, elected in 1989, retained in 1999 and 2009. I have served for 26 years as a Judge. I have presided over thousands of criminal cases including over 15 death penalty

cases. In 2009 I was appointed Administrative Judge of the Criminal Division of the Fifth Judicial District and in 2013, I was elected President Judge of the second largest Court system in Pennsylvania. I do not say this to, "toot my own horn." I only hope that my credentials will give you some confidence in words I have to say.

The Felony Murder Doctrine is DRACONIAN. (In Draco's Greek state, 600 B.C.: **All crimes were punishable by death.**)

The Felony Murder Rule as set forth by our legislature 100 years ago imposed the first mandatory sentence for crimes other than intentional murder. A verdict of felony murder (Second Degree) prevents judges from assessing the relative culpability of individual defendants and prevents judges from imposing "appropriate" punishment. Why do we impose the same punishment on the getaway driver in the bank robbery who did not know that his miscreant friend in the bank had a gun, was nervous, and shot killing the teller? Under the Felony Murder Rule, all receive the same sentence, life without the possibility of parole, regardless of their individual culpability and intent.

We bemoan prison overcrowding. We talk about punishment fitting the crime (Gilbert & Sullivan, *The Mikoda*), but, it is a significant cause of the first and an inappropriate consequence of the latter, in felony murder cases.

The legislature, fearful of the "soft on crime" label, misses the point: We have innumerable inmates serving life without parole who were involved in serious and brutal felonies, but **did not commit the act that caused the death of the victim.** How many do we have in the state penal system? There are 5,348 inmates in the state system serving life without parole of which 1,209 were convicted of felony murder. The Department of Corrections cannot tell us how many of those did not directly cause a death, but the number is likely substantial. That's overcrowding. That's the shame of a life sentence for those who did not take a life.

Lest anyone claim that I came to these conclusions as an epiphany, I have attached an article from Duquesne Law School Juris Magazine (1977) in which, as a federal prosecutor, I describe the injustice in the Wideman case without mentioning it.

Since the legislature is not likely to repeal the Felony Murder Rule and give the judiciary the authority to decide the varying culpabilities of conspiratorial participants in felony murder cases, the executive branch needs to "step up to the plate."

Is 25 years to life, 35 years to life, or 40 years to life (Wideman's time) **enough**, for a man who did not take another's life? Those are the statutorily prescribed sentences in other States. I suggest to you they are enough and leave to

your sound discretion the point at which sufficient time, punishment, incapacitation and retribution has been imposed upon the criminal **who did not commit the killing.**

I respectfully urge the Board of Pardons to grant serious consideration to Robert Wideman's petition for commutation. I am informed he has been a model inmate. Therefore, I urge you to grant him commutation of time served and lifetime parole and in saying so, I ask, as a trial judge who has spent his entire career in criminal justice, that you consider the petitions of all inmates sentenced to life without parole **who did not commit any act which directly caused the death of another human being,** and consider them for commutation as well.

Justice requires it.

Very truly yours,

JEFFREY A. MANNING
President Judge

Felony Murder: Does The Punishment Fit The Crime

by: Jeffrey A. Manning

I.

In the origins of English law all felonies were punishable by hanging. These included burglaries, robberies, rapes, sodomies, arsons, and horse thefts. Chief among these, considered the most heinous of all crimes, was murder.

As society and law evolved, most felonies became non-capital offenses, and homicides developed "degrees" of culpability, so that, by the beginning of the twentieth century, only murder of the first degree carried a mandatory penalty. In 1925, Pennsylvania adopted the "split verdict" statute, giving to the jury the right to set the penalty for first degree murder at death or life imprisonment.

First degree murder, at common law, and by statute, encompassed two types of offenses, (a) the willful, deliberate and premeditated killing; and, (b) the felony murder.

Under the "felony murder rule," if a death occurred while a felony was being committed, the felon and all his accomplices were held for murder in the first degree.

This law has changed only slightly from its origin to modern times. The number of felonies upon which felony murder lies, has been reduced to the six most serious and violent. They are robbery, rape, deviate sexual intercourse by force, arson, burglary or kidnapping. Additionally, the cases of *Commonwealth v. Redline*, etc. removed from the felons liability for any death resulting from the physical act of a non-conspirator, or the death of a co-felon. Therefrom, if a police officer shot a bystander or a co-felon, the conspirators could not become defendants to a felony-murder charge.

Other than these limitations, the "felony murder rule" has remained unchanged for centuries. As a rule of law, felony murder is a legal fiction which, stated simply, means: If an individual intends to commit a felony, and in the course of committing, attempting, or fleeing from the commission of that felony, he causes the death of another person, he is liable for the death as if he had intended the killing. Secondarily, the "rule" means: where two or more people conspire to commit a felony, and in the attempt, commission, or flight from the crime, one felon causes the death of another person, all perpetrators are *equally* liable on a charge of felony murder.

Our present murder statute provides that felony murder constitutes murder in the second degree, carrying a mandatory life sentence, with the felony itself carrying a discretionary 10 to 20 year sentence. A person convicted of felony murder would therefore serve a life term whether he physically did the act causing death or not.

There has been much discussion in our courts as to whether the "shooter," or the felon whose hand caused the death can be guilty of the felony *and* of murder in the first degree. It is conceivable that within the felonious intent a homicidal intent may occur, and the actor may be guilty of the felony and of a willful, deliberate and premeditated murder, subjecting him to conviction of the higher degree and the possible imposition of the death penalty.

Felony murder is a heinous crime, and for that reason carries a most severe penalty. Whether the penalty is designed to punish, deter, or both, its severity matches only the viciousness of the crime and society's desire to protect itself from exceptional violence.

Of the homicides committed in Pennsylvania, roughly one out of eight is a felony murder. Of the felony murders in Allegheny County, better than 85% involve the felony of robbery. Statistics show that most armed robbers are graduate petty criminals, and many felony murders are committed by graduate felons. There is a great deal of social and cultural difference between the average murderer, who shoots his wife, or stabs his friend in a tavern argument, and the individual who uses a firearm to frighten and steal, and in the process takes a life. Practically, there is no more vicious criminal than the felony murderer.

II.

With the law and the violence of the crime in mind, it is necessary now to look at the facts. Another statistic is important to note: less than half of the defendants charged with felony murder actually committed the physical act causing the death.

Prior to October 7, 1976, every defendant charged with murder had an absolute right to a separate trial from all others charged with the same offense. This meant that three robbers, one driving the "getaway" car, one holding a weapon and taking money, and the third holding a weapon and taking a life were entitled to separate trials.

On a factual examination, applying contemporary moral standards, it is usually contended that the shooting felon is most culpable and the getaway driver least culpable. The law, however, deals with all equally, each being subject to the same prosecution and penalty.

The practical application of the "rule", therefore becomes difficult: difficult for the jury, the prosecution, and the defense. The problem lies not in cases involving a single actor, but those of multiple defendants. In the recent past, juries have had continuing difficulty convicting a getaway driver of the same penalty carrying offenses as the gunman, particularly since the statute requires that the jury be informed of the penalties for murder. (Act 46 of 1974). Although the Pennsylvania Supreme Court has upheld "inconsistent" verdicts (e.g. guilty-robbery, guilty-voluntary manslaughter), these results are incongruous and indicate the juries consideration of factors other than strict application of the law. The yough, lack of maturity, lack of prior criminal activity, are all part of an "inconsistent" verdict. The elements of sympathy, pity, and compassion often enter into the verdict to reduce felony murder to a lesser and inconsistent degree of homicide. But often, the lesser verdict can be blamed on the "weakness" of the Commonwealth's case and the factual degree of the defendant's

Editor's Note: Jeffrey Manning graduated from Dickinson College in 1969 and from Duquesne University School of Law in 1972. For the past three years he acted as a chief homicide prosecutor for the Allegheny County District Attorney. Recently he was appointed Assistant United States Attorney for the Western District of Pennsylvania.

involvement in the felony. That is not to say that justice is not done, but that the full effect of the enacted law is not enforced. Some glaring examples of this problem are these: 1) In November, 1975, three men robbed a used car dealer, and as he attempted to flee, one of the three shot him in the back with a .44 magnum, a wound from which he did not recover. The three were arrested and tried by separate juries. Two, one of whom was the shooter, were convicted of felony murder and robbery. The third, against whom the Commonwealth had its weakest case, and the only one of the three with no prior record, was convicted of third degree murder and robbery; 2) Three individuals were indicted for murder and robbery of a drug dealer in 1971. Two were arrested and tried together and convicted of felony murder and robbery. Neither was the "shooter". Some time later, the third man, who killed the victim with a single shotgun blast, was convicted of voluntary manslaughter; 3) In October, 1975, a security guard was gunned down in the attempted robbery of a liquor store. Four men were arrested. One entered a general plea, and the court set the degree at felony murder (second degree). The other three were each tried by separate juries. One was convicted of felony murder. The remaining two were convicted of third degree. Of the remaining two, one was the shooter.

The felony murder doctrine not only creates problems for juries, but also for attorneys on both sides. Many homicide cases proceed non-jury or on a general plea of guilty. This is not true of felony-murder cases. A defense attorney can hardly be expected to recommend that his client enter a general plea knowing that the only appropriate degree of guilt means a mandatory life sentence. Nor can he recommend a trial without jury where his only defenses may be sympathy, pity, or an obtuse type of defense that laymen would find acceptable, but a judge would not.

The District Attorney, while being able to negotiate a plea of degree and sentence based on the facts and merits of his case, is hard pressed to justify a plea-bargain to a lesser degree of murder than second degree. He cannot call felony murder, voluntary manslaughter, or say a principal is an accessory after the fact in order to reduce the lawful penalty. To do so, he must ignore the law or torture the facts. This is not to say, that felony murder cases are never plea bargained. In order to obtain a conviction, or testimony, the District Attorney may agree to a disposition less than felony murder. But it still places him in a position of agreeing to a plea that is inconsistent with the law of the Commonwealth.

The problem of present day application of the felony murder doctrine has distressed not only juries and attorneys, but legal theorists and jurists, because the inconsistent, non-felony murder verdict has sharply increased in felony murder cases in the past ten years.

III.

There is little doubt that the designed intent of the rule is to deter not only the commission of serious felonies, but the use of weapons, force and violence in their perpetration. There is also little doubt that the law, as presently structured, has a blanket effect on all those involved in the death producing felony, despite their actual degree of culpability.

Several solutions have been proposed. Foremost among these was the proposition eliminating the absolute right to severance in homicide cases. As of October 7, 1976, the right to sever is no longer absolute and the Commonwealth has a right to joinder with the consent of the court (Act 231 of 1976).

In the future, on motion of the District Attorney, the court may rule that co-felons shall be tried together, the jury rendering a verdict on each. In a time when the Appellate Courts are broadening the defendant's rights to sever, this law may be practically inapplicable. And if applied, what will be its effect? The problem with joint trial is a double-edged sword. The jury might acquit, or reduce the degree for an otherwise guilty defendant, being influenced by the innocence or lack of evidence against an accomplice. On the other hand, they could conceivably convict the innocent due to the heinous nature of the crime, and the obvious guilt of a co-conspirator. Or would the discerning jury find the shooter guilty of felony murder, the immediate accomplice guilty of third degree murder, and the getaway car driver guilty of voluntary manslaughter? I suggest the latter is the most probable result, and indicates that the blanket effect of the felony murder rule may no longer be appropriate.

The Pennsylvania Crimes Code provides for eight different degrees of assault, from harrassment through causing serious bodily injury to a police officer making a lawful arrest. But only one grade of crime exists where a felony is committed and a death occurs — murder in the second degree, mandatory life imprisonment. The Crimes Code provides for five degrees of theft, summary through felony, and five degrees of homicide, but only one degree of felony murder. The death need not be intentional or even caused by the physical act of the defendant for him to be subjected to a penalty otherwise reserved only for a willful, deliberate and premeditated murder, *plus* a possible consecutive 10 to 20 year sentence for the felony.

Could multiple felony murder cases be alleged and prosecuted on the basis of the degree of factual culpability of the individual defendant? Yes. Each defendant should be treated equally in the culpability of the instant felony. The present rules of accomplice, principal and accessory should continue to be applied to the felony, and the grading of culpability for the death could then be based on: 1) participation in the felony; and 2) the physical act causing death. For example:

Felony-murder "A:"

In the perpetration of a felony, the actor caused by his act the death of another.

Jury to set penalty at death or mandatory life imprisonment based on aggravating circumstances, etc.

Felony-murder "B:"

The actor participated in the perpetration of a felony, which resulted in the death of another through the act of his accomplice, and the actor

a) assaulted another person;
b) carried or used in any manner, a deadly weapon; or,
c) willfully or recklessly engaged in conduct causing or risking serious bodily injury or death.

Maximum sentence of life imprisonment.
Mandatory minimum of 10 years.

Felony-murder "C:"

The actor participated in the perpetration of a felony which resulted in the death of another.

Maximum sentence of 20 years.
Mandatory minimum sentence of five years.

Using my first hypothetical of the three robbers, the gunman would be liable for felony-murder "A," mandatory life (or Murder One if his act were intentional); the second armed man, who did not shoot, would be liable for felony-murder "B," a 10 year minimum and a possible life maximum, which could be set by the court, or negotiated on a plea; and, the getaway driver would be liable for felony-murder "C," with a minimum of 5 years and a maximum of 20, discretionary with the court or subject to plea negotiation. Juries could of course, reduce the degree of the allegation, but in each case would be presented with law based on actual culpability. The jury would know that the punishment fits the culpability in the crime.

This is not a proposal for legislative action, but merely a suggestion of how the courts could be relieved of "inconsistent" verdicts and the jury given more room within which to legally determine an individual's culpability in a crime based on his "participation".

The felony murder doctrine is a legal fiction, and recent jury verdicts have indicated its demise is overdue. As in narcotics violations, thefts, or assaults, minimal involvement should garner a lesser penalty, while maximum involvement should earn a maximum penalty. Let the punishment really fit the crime.